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IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The American Trucking Associations, Inc. (ATA) and National Solid Wastes Management Association ("NSWMA") respectfully submit this brief as *amici curiae* in support of the petition.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and its members, made a

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

There is currently a split between two of the federal appeals courts on a core dormant Commerce Clause issue—

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monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

what standard applies to a flow control ordinance when the ordinance designates a government-owned waste disposal facility as the sole recipient of waste materials. This split requires Supreme Court resolution, as it is creating uncertainty in many parts of the United States concerning the extent of local government authority over solid waste disposal.

More than four years ago, NSWMA and ATA warned that the Second Circuit's initial decision in this case provides a "blueprint" for local governments to evade their Commerce Clause obligations, and predicted that other localities, including local governments outside the Second Circuit, would use this case as an excuse to prevent waste from entering the interstate market. Brief of Amici Curiae National Solid Wastes Management Association, *et al*, at 6. Unfortunately, this prediction has come true. The past few years have seen a substantial increase in flow control laws and legal challenges to them under the dormant Commerce Clause. In virtually all of these cases, local governments have sought to justify their monopolization of waste flow by citing to the Second Circuit's decisions in this proceeding. Unless reversed by this Court, the decision below threatens to disrupt even further the functioning of the interstate market for solid waste and recycling services. Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry itself and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws,[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as

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[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

protected facilities set their rates without fear of competition. Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect local facilities which previously had depended on out-of-state waste for their financial viability.

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself. . . ." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by NSWMA),[3] localities sought to perpetuate flow control by

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[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999); *Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on*

attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts once again became "clogged with cases challenging restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

The decision of the Second Circuit, Pet. App. at 1a-33a, threatens to undo much that has been accomplished. In response to the Second Circuit's initial 2001 decision in this case, 261 F.3d 245, local governments throughout the United States have enacted flow control laws that rely on the Second Circuit's novel interpretation of *Carbone* and the dormant Commerce Clause. See *National Solid Waste Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006); *National Solid Waste Mgmt. Ass'n v. Pine Belt Regional Solid Waste Mgmt.*

Environment and Public Works, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

[4] *See, e.g., Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't.* 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); and *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

Auth., 389 F.3d 491 (5th Cir. 2004); *Waste Mgmt. of Carolinas, Inc. v. New Hanover Cty.*, No. 93-113 (E.D.N.C. Feb. 21, 2003).

In the *Daviess County* case, the Sixth Circuit expressly "decline[d] to adopt" the "private-public distinction" created by the Second Circuit in this case. 434 F.3d at 909. Characterizing the Second Circuit's decision as "surprising," *id.* at 910, the Sixth Circuit stated it "respectfully disagrees with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court." *Id.* Unless this Court resolves this conflict, local governments, waste haulers and landfills will remain confused as to the application of the dormant Commerce Clause to flow control laws, and local governments will be encouraged to enact such laws.

For example, just last month, NSWMA filed an amicus brief in *Quality Compliance Services, Inc. v. Dougherty Cty.*, No. 05-19 (M.D. Ga.) in opposition to flow control laws recently enacted by two local governments in Georgia. The continued enactment of anti-competitive flow control laws and the conflict between the Circuits on this core dormant Commerce Clause issue demonstrate the national scope and immediacy of this issue for the solid waste industry and its customers.

The decision below provides a blueprint by which a municipality, county or state can readily re-activate flow control as to any publicly owned facility and extend flow control to privately owned facilities by the simple expedient of restructuring its financial arrangement with such facility to vest ownership in a public entity. Given the active and continued resistance of many local, county and state governments to this Court's *Carbone* decision, and based on the recent surge in local flow control laws throughout the United States, *amici* have no doubt that local, county and state governments will be quick to take advantage of this new opportunity. Prompt

review by the Court is thus essential to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted.

SUMMARY OF ARGUMENT

There is a split between the Second and Sixth Circuits that requires review on an important Commerce Clause issue. The Second Circuit has ruled that such flow control laws are not subject to the "virtually per se rule of invalidity" applicable to discriminatory laws, *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), but are instead reviewed under an unusual interpretation of the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Unless resolved, all entities interested in waste management—including local and state governments, waste haulers, landfills and others—will be confused with regard to the scope of a local government's flow control authority under the dormant Commerce Clause. This confusion is evident by the increase in flow control laws possed by local governments since the Second Circuit's initial decision in this case in 2001.

Over 60 percent of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws will be enacted with respect to many of those facilities, thereby locking millions of tons of waste out of the interstate market. Such effects will not be limited to states in the Second Circuit. Waste from those states currently is moving to facilities in at least nine other Northeastern and Midwestern states. Indeed, since the Second Circuit's initial decision in this case, local govern-

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[5] Chartwell Information, *Directory & Atlas of Solid Waste Disposal Facilities 2003*, Table 2 at vii (7th ed. 2003) (62% of waste facilities are publicly owned).

ments in Kentucky (Daviess County) and Mississippi (Pine Belt Regional Solid Waste Management Authority) have adopted flow control laws, relying on the Second Circuit's erroneous interpretation of *Carbone* and the dormant Commerce Clause.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the technical issue of ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance—which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THERE IS A SPLIT BETWEEN THE CIRCUITS ON A CORE COMMERCE CLAUSE ISSUE THAT REQUIRES THE SUPREME COURT'S REVIEW

There is a split in authority between the Second Circuit and the Sixth Circuit's decision in *National Solid Wastes Mgmt. Ass'n. v. Daviess Cty.*, 434 F.3d 898 (6th Cir. 2006) over

whether the *Pike* balancing test, 397 U.S. at 142, applies when a flow control ordinance designates a government-owned waste disposal facility as the recipient of waste. In the decision below, the Second Circuit ruled that *Pike* applies in such situations. In *Daviess County*, the Sixth Circuit expressly declined to follow its sister court's "surprising" interpretation of the *Carbone* decision. 434 F.3d at 909-912. Carefully parsing and analyzing the language of *Carbone*, it concluded that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." *Id.* at 910. The Sixth Circuit also found the Second Circuit's interpretation of other dormant Commerce Clause decisions to be "similarly strained." *Id.* at 912.

Indeed, until the Second Circuit's decision, it was understood by all parties with a stake in solid waste disposal—including municipalities and counties as well as solid waste facility operators, recyclers and haulers—to apply to privately owned and publicly owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[6] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately owned facilities[7] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[8] the majority opinion did not even hint that the constitutionality of the ordinance might

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[6] *Carbone*, 511 U.S. at 383.

[7] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[8] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility. . . ." *Id.* at 396.

hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

In the immediate aftermath of *Carbone*, at least three courts of appeals and two district courts invalidated flow control laws where the facility at issue was publicly owned.[9] Moreover, several district courts that had occasion to address the significance of public versus private ownership of waste facilities both concluded that public ownership made no difference.[10] In this context, the current confusion created by the recent split between the Circuits extends far beyond the Second Circuit.

First, as to the immediate impact, the states that lie within the Second Circuit—New York, Connecticut and Vermont—

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[9] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county owned landfills), *cert. denied*, 516 U.S. 1173 (1996); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); and *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[10] *See National Solid Wastes Mgmt. Ass'n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F.Supp.2d 644 (S.D. Miss. 2003) (rejecting Second Circuit's analysis of *Carbone*), *rev'd on other grounds*, 389 F.3d 491 (5th Cir. 2004); *Southcentral Pa. WasteHaulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) (invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in Carbone would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance.").

are among the most prolific waste-exporting states in the Nation, and the states that currently receive waste from New York, Connecticut and Vermont include states located in five Circuits. New York alone exported more than 8 million tons of waste in 2003, including 3.7 million tons to Pennsylvania, 1.7 million tons to Virginia, 1.6 million tons to New Jersey, 887,000 tons to Ohio, and smaller quantities of waste to Georgia, Massachusetts, Michigan and West Virginia. Connecticut exported more than 634,000 tons of waste in 2003, including 283,157 tons to Pennsylvania, 234,311 tons to Ohio, and smaller quantities to Massachusetts, Michigan and New York. Vermont exported 126,159 tons of waste in 2002, primarily to New Hampshire and New York.[11] Moreover, a high percentage of the 569 waste facilities in the Second Circuit are publicly owned: over 80% in Connecticut, over 75% in New York, and over 75% in Vermont. Thus, if the Second Circuit's decision is not overturned, local governments in these states will be free to re-institute flow control laws with respect to over 80% of the transfer stations, nearly 70% of the landfills, and over 70% of the waste-to-energy facilities in the region, thereby depriving competitors in at least eight other states of the solid waste now moving to out-of-state facilities in the free interstate market.[12] Overall, millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities in the Second Circuit if the decision below is allowed to stand.

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit's decision is overturned. Many

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[11] James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2004 Update* at Tbl. 4 (Sept. 9, 2004).

[12] *Directory & Atlas of Solid Waste Disposal Facilities 2003*, *supra* note 5, at 160-76, 628-702, 942-55.

local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies, railroads or barges to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[13] In New York, numerous waste collectors operating in counties with publicly-owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate those facilities efficiently.

The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid waste.[14] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate

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[13] In New York City alone, more than 250 licensed haulers collect commercial and industrial solid waste. Virtually all of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

[14] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 4a-5a.

market for recyclables and the industries that depend on that market.[15]

Counties and municipalities in other Circuits can hardly be expected to stand idly by while those in the Second Circuit take advantage of their new-found ability to hoard waste for their publicly owned facilities. In Pennsylvania, for example, which received more than 3.7 million tons of waste from New York in 2003, or in other states, a loss of waste originating in New York will undoubtedly lead to flow control laws as local governments act to hoard all of their own "homegrown" product. The resulting spiral of protectionist legislation is precisely the evil that *Carbone* was intended to halt. *See Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

Nor will the effects of the Second Circuit's decision be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its relationship with the private company so as to vest ownership in a public body—and thereby make itself eligible for flow control. Under the Second Circuit's decision, there is no requirement that the waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly owned facility would be entitled to the benefit of flow control laws once the conversion had been accom-

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[15] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

plished.[16] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties involved created a "waste management authority" to acquire ownership of the facilities.[17] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[18] there is little, if any, disincentive to conversion.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible. While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the decision below.

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[16] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York — whose flow control ordinance was declared unconstitutional by this Court in *Carbone* — could attempt to argue that its ordinance will become constitutional the moment it exercises its option to purchase the facility.

[17] Under the agreement between the Counties and the waste management authority, the Authority is to manage and dispose of all solid waste within the Counties and operate the local energy recovery facility and recycling center. In return, the Counties guarantee the Authority's operating costs and debt service payments. Pet. App. at 26a. As a practical matter, such an arrangement is virtually indistinguishable from the arrangement in *Carbone* between the city and the owner of the favored facility.

[18] Pet. App. at 28a.

II. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately owned and publicly owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the market. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is, but for the Second Circuit's decision, typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consquences, and potential liability issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in the jurisdiction to a local facility should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including dozens of counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[19] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in ownership has no practical impact

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[19] *Directory & Atlas of Solid Waste Disposal Facilities 2003*, *supra* note 5, at 628-702.

either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. In this light, the Second Circuit's conclusion that a flow control law favoring government owned facilities imposes an "insubstantial burden" on interstate commerce under *Pike* makes little sense. Further, the application of *Pike* below is in conflict with several appeals court decisions. See, e.g., *U&I Sanitation*, 205 F.3d at 1069-72. The constitutionality of a flow control law would thus turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[20] This simply reflects the reality that property ownership is no longer of talismanic significance in business transactions. The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the

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[20] *See* U.C.C. § 9-202 (2000).

"metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id.* at 294-95, the Court evaluated the constitutionality of the challenged taxes on the practical basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389.

From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same—the locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility—and pay the higher tipping fee

charged by that facility.[21] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause. Regardless of whether flow control laws favor publicly or privately owned facilities, the ripple effect of such laws will be felt throughout the interstate transportation industry. A revitalization of flow control or confusion about its constitutionality under the Commerce Clause due to the current split between the Second and Sixth Circuits will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities. By forcing waste to be taken to local facilities, flow control laws of the sort permissible under the Second Circuit's decision will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Second Circuit's decision will affect not only those businesses specifically engaged in the interstate transportation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the creation of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability. The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 48a, than one that forces trash to go to a privately owned facility is simply

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[21] As the Second Circuit previously recognized in the case at bar, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. at 29a.

naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests—including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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